RECENT CASES

CONTRACTS—WHAT LAW GOVERNS—CAPACITY TO CONTRACT.—HAMMERSTEIN V. SYLVA, 124 N. Y. SUP. 535.—*Held,* The capacity of an operatic singer, domiciled in the United States, to contract for services in the United States, is governed by the laws of that country, where the contract was made in France.

The general rule is that the law governing the capacity to contract is the law of the place where the contract is made. *Gates v. Bingham,* 49 Conn., 275; *Appeal of Huey,* 1 Grant Cas., 51; *U. S. v. Garlinghouse,* Fed. Cas., No. 15,189; 4 Ben., 194; *Story's Conflict of Laws,* sec. 103. The law governing the validity of a contract, validity including capacity. is that of the place where made. *Scudder v. Union Nat. Bank,* 91 U. S., 406; *Baxter Nat. Bank v. Talbot,* 154 Mass., 213; *Union Nat. Bank v. Chapman,* 169 N. Y., 538. But, where the intent is that the performance shall be in a state or country other than the place of contracting, the validity, obligation and effect is determined by the law of the place of performance. *Butler v. Myer,* 17 Ind., 77; *Pittsburg, Cincinnati, Chicago, and St. Louis R. R. Co. v. Sheppard,* 56 Ohio, 68, *Contra.* Even where the contract is made with a view to performance elsewhere, it has been held that the capacity to contract is governed by the law of the place where made. *Campbell v. Crampton,* 2 Fed., 417. In England, the rule is that "the personal capacity to enter into any contract is to be decided by the domicile"; *Guefratte v. Young,* 4 DeG. & Sen., 217. But, in America, the English rule has been held in a very few cases; then the domicile and place of making contract were the same. *Matthews v. Murchison,* 17 Fed., 760; *Augusta Ins. & Banking Co. v. Morton,* 3 La. Ann., 417.

DAMAGES—LIQUIDATED DAMAGES OR PENALTY—PURPOSE OF AGREEMENT. —FLORENCE WAGON WORKS V. SALMON, 68 S. E., 866 (GA.).—*Held,* that where a designated sum is inserted into a contract for the purpose of deterring one or both of the parties from breaching it, it is a penalty; but where it is inserted as the result of a *bona fide* effort of the parties to liquidate in advance and agree upon the sum that should represent the damages which would be actually sustained in the event of a breach, it will be upheld and enforced (unless unconscionable or oppressive), especially in cases where the damages cannot be readily estimated according to some legal standard or measure of damage.

As to whether a sum agreed to be paid as damages for the violation of an agreement shall be considered as liquidated damages or only as a penalty is held to depend upon the meaning and intent of the parties as gathered from the full view of the provisions of the contract, the terms used to express the intent, and the peculiar circumstances of the subject matter of the agreement. *Hosmer v. True,* 19 Barb. (N. Y.), 106; *Marsh v. Allabaugh,* 103 Pa. St., 335; also in determining whether an amount named in the contract is to be taken as penalty or liquidated damages, courts are influenced largely by the reasonableness of the transaction and

are not restrained by the form of the agreement or by the terms used by the parties, or even by their manifest intent which shall be carried out only as far as it is right and reasonable. *Davis v. U. S.,* 17 Ct. Ct., 201. It has been held that the use of the word "penalty" or "liquidated damages" with the sum named is not conclusive on the point. *Miller v. Elliott,* 1 Ind., 484; *Davies v. Freeman,* 10 Mich., 188. It is the tendency and preference of the law, however, to regard a sum stated to be payable, if the contract is not fulfilled, as a penalty and not as liquidated damages. *Wallis v. Carpenter,* 13 Allen (Mass.), 19; *Whitfield v. Levy,* 35 N. J. L., 149. And where the damages provided for in the agreement are disproportionate to the several covenants therein provided, in some cases being grossly excessive and in others entirely inadequate, they will be construed as a penalty rather than as liquidated. *Clement v. Cash,* 21 N. Y., 253; *Watts v. Sheppard,* 2 Ala., 425. But if from the nature of the contract the damages cannot be calculated with any degree of certainty the stipulated sum will be held to be liquidated damages, otherwise a penalty. *Lynde v. Thompson,* 2 Allen (Mass.), 456.

DEATH—EVIDENCE—DISAPPEARANCE IN FACE OF FATAL DANGER.—IN RE MILLER, 124 N. Y. SUPP., 825.—*Held,* that though the unexplained disappearance of a man is not a sufficient foundation for the presumption of his death, yet where the testator in a stormy night attempted to reach a houseboat in which he lived and the evidence tended to show that he was drowned in the effort, and that his body was carried out to sea and he was never seen after such time, it justified a finding of death.

The point was directly ruled in *Davie v. Briggs,* 97 U. S., 628, where a person when last heard from was faced with the same peril it was held that this circumstance may raise a presumption of death without regard to the duration of the absence. Rulings on the same line are found in *Travellers' Insurance Co. v. Rosch,* 23 Ohio, 491; *Lancaster v. Washington Life Ins. Co.,* 62 Mo., 121. *In re Buckham's Will,* 5 N. Y. Supp., 565. But the mere absence of a person from the commonwealth without being heard from for any period short of seven years is not sufficient to raise a presumption of death. *State v. Henke,* 58 Iowa, 457; *Newman v. Jenkins,* 27 Mass., 515. In support of which it has been set down as a rule that where a person is once shown to have been living, there is a presumption that he continues to live until the contrary is proved. *Lane v. Fulke,* 103 Ill., 58; *Smith v. Knowlton,* 11 N. H. 191; *Emerson v. White,* 29 N. H., 482. However, the weight of authority is distinctly stated in the case of *Eagle v. Emnett,* 4 Bradf., 117, where it was held that "the fact of death may be found from absence of less than seven years coupled with other circumstances tending to show it."

EMINENT DOMAIN—PUBLIC SERVICE CORPORATION—PRIOR PUBLIC USE. —STATE EX REL EVERETT & CHERRY VALLEY TRACTION CO. V. SUPERIOR COURT OF KINGS COUNTY, 110 PA. 428 (WASH.).—*Held,* that one public service corporation may condemn and take a portion of the right of way or property of another when there is a necessity therefor, and when the